

IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: 07/2017

[2018] SCSC 214

THE REPUBLIC

versus

Nedy Micock

Vivian Domingue

Accused

Heard: 28 September 2017- 20 October 2017, Submissions 11 December 2017.

Counsel: Ms. Brigitte Confait for the Republic
Mr. Joel Camille and Mr. Clifford Andre for the Accused

Delivered: 5 March 2018

JUDGMENT

M. TWOMEY, CJ

[1] Nedy Micock (First Accused) and Vivian Domingue (Second Accused) stand charged with: *Count One: Importation of a controlled drug contrary to section 3 as read with section 26 (1) (a) of the Misuse of Drugs Act 1990 (Cap 133) and with section 22 (a) of the Penal Code (Cap 158), and punishable under section 29 (1) of the Misuse of Drugs Act read with the Second Schedule thereof; and*

Count Two: Conspiracy to commit the offence of importation of a controlled drug contrary to section 28 (a) read with sections 3 and 26 (1) (a) of the Misuse of Drugs Act

(Cap 133) and punishable under sections 28 and 29 of the said Act and the Second Schedule thereof.

[2] The particulars of the offence, as set out in the charge sheet, are that, on:

Count 1

Nedy Conrad Rodney Micoock and Vivian Nelson Georges Domingue, between the months of February 2015 and March 2015, with common intention, imported into Seychelles controlled drugs, namely heroin (diamorphine) having a total net weight of 35, 923, 90 grams containing 23, 474.90 grams of pure heroin (diamorphine) by causing the said controlled drug to be imported into Seychelles through the Seychelles International Airport, Pointe Larue, Mahe.

Count 2

Nedy Conrad Rodney Micoock and Vivian Nelson Georges Domingue, between the months of February 2015 and March 2015 agreed with one another and with other persons, known to the Republic, namely Vincent Florentine and Theresette Barbé , that a course of conduct, shall (sic) be pursued, which if pursued, will (sic) necessarily involve the commission of an offence by them under the Misuse of Drugs Act, namely the offence of importation of a controlled drug, namely heroin (diamorphine) having a net total weight of 35,923.90 grams containing 23,474.90 grams of pure heroin (diamorphine).

[3] The prosecution called twenty five witnesses and of these, three persons, namely Vincent Florentine, Theresette Barbé and Andy Barbé, were made state witnesses under section 61A of the Criminal Procedure Code Cap 54 (the Code) after they were made an offer under section 61A(1) of the Code.

[4] The thrust of the prosecution case, briefly, is that the two accused persons agreed and conspired with each other and other persons, namely Theresette Barbé, Vincent Florentine and Andy Barbé to import controlled drugs, namely heroin, contained in wooden boxes into Seychelles from Dubai aboard an Emirates aircraft.

- [5] The prosecution of the case was initially pursued against Vincent Florentine, Theresette Barbé and Daniel Rose (CR 23/2015), but after the Attorney General had entered into agreement with two of above named accused persons in terms of section 61A of the Criminal Procedure Code, charges were dropped against them and preferred against the persons presently accused. The exhibits originally produced in the first trial and kept in the court registry were re-produced by the court officers, namely Ms. Emmanuella Bonne and the Registrar, Mrs. Juliana Esticot, for the purposes of the second trial. I shall return to this matter later as the chain of custody of the exhibited drugs is being challenged.
- [6] At trial, Vincent Florentine testifying for the Prosecution stated that he travelled approximately five to six times to Dubai between the period of 2012 and 2015, during which he had only once paid for his own ticket and travelled on his own accord. He gave evidence that on all other occasions the First Accused gave him money to pay for his ticket and provided him with his visa to travel to Dubai (Exhibit P24). He also testified that in 2014, he was hired by the First and Second Accused to ship two wooden boxes for them from Dubai to Seychelles. In Dubai, he stayed in the New Peninsula Hotel. In 2015, the Second Accused informed him there was another cargo consignment to be shipped from Dubai for the First and Second Accused. The First Accused gave him cash for his ticket aboard Emirates Airline and his visa for Dubai. He once again stayed at the New Peninsula Hotel. The First and Second Accused persons stayed at a different hotel from his in Deira.
- [7] The Second Accused instructed and directed him to collect the cargo from an apartment in Sharjah, from which three wooden boxes (see photographs 15, 16 & 17 of Exhibit P2) were handed to him by some African Nationals. He then collected an envelope containing documentation for the cargo from the First Accused. He took the boxes to Maltrans, where he was informed that he was late and that the weighing of the cargo would have to take place at the airport instead of the cargo terminal. Once he had completed the weighing at the airport, he returned to Maltrans to inform the Accused persons of the weight of the boxes (450 kg). He then collected the money for payment of the cargo from the Second Accused in his hotel in Deira, and paid for the shipment at Maltrans.

- [8] Two days following the shipment, the First and Second Accused telephoned him to inform him that the NDEA had intercepted the cargo and that the driver who had collected the cargo, Andy Barbé, and the customs officer had been arrested. The two accused persons further informed him that they were leaving Dubai for China and asked the witness if he would like to join them. He declined the offer and returned to Seychelles instead, not wanting to worsen his situation.
- [9] Mr. Florentine's account was corroborated by the evidence of another prosecution witness, Theresette Barbé, a former Senior Customs Officer, who gave sworn evidence pursuant to a conditional offer agreement signed with the Attorney-General under section 61 (A) of the Criminal Procedure Code.
- [10] It was her testimony that the First Accused informed her that he was importing drugs, addressed to PUC, through the airport cargo section, and that he had the assistance of someone at customs who was on rotation. She gave evidence that the First Accused had introduced her to the Second Accused and told her that they were in the drug business together. In March 2015, the First Accused telephoned her from Dubai to inform her that he had emailed her relevant documentation, including the airway bill, the freight invoice and invoice for consignments, which were required for the preparation of the bill of entry (Exhibits P13, P17 & P19). She was responsible for making arrangements with Flash Clearing Agency to prepare the said bill of entries and to clear the cargoes of the First Accused. The airway bill number was 4290, the consignee was PUC, the shipper was Industrial Supplies, and the issuing carrier was Maltrans Emirates. Further, flight EK707 travelled on 20 March 2015 and the consignment consisted of three pieces, with a net weight of 450kg, and the description of the consignment specified hardware.
- [11] She stated that the First Accused, while in Dubai, would remain in constant contact with her via mobile phone to verify the release of the three wooden boxes. She 'miscalled' the First Accused once the said boxes were ready for collection, and subsequently one Andy Barbé would arrive to collect them.
- [12] Altogether she gave five statements to the police in 2015, and one in 2017, and stated that she gave the most recent one pursuant to an agreement with the Attorney-General. She

was able to correctly identify the boxes in the photographs as the ones she released for the First Accused and was able to identify their contents.

- [13] The evidence of Georges D'Offay from Cable & Wireless, corroborated the account of Theresette Barbé regarding the telephone calls. He produced telephone records which showed communication between Dubai number 00971525122161 with Seychelles number 2600797, registered to Shirley Gabriel, between the period of 17 March 2015 and 21 March 2015.
- [14] Theresette Barbé's evidence was further corroborated by that of Officer Daniel Delcy, who was approached by her to assist with the importation of drugs by ensuring that the consignment was released without being subjected to a search. He was offered SR150,000- for this service.
- [15] Heather Longhurst, the owner of Flash Clearing Agency, further corroborated Theresette Barbé's account by giving evidence that she assisted Theresette Barbé in clearing the drugs on one occasion in March 2015 by instructing her employees, Shannon Barbé and Brigitte Jumeau, to prepare and handle the relevant paperwork.
- [16] Shannon Barbé corroborated this account by testifying that Heather Longhurst instructed her on 20th March 2015 to prepare the bill of entry for a consignment for PUC on 21 March 2015. Ms. Barbé gave further evidence that the consignee's name was PUC, the consignment was shipped from Dubai aboard an Emirates flight which was to arrive on 20 March 2015, and the weight of the consignment, which comprised of three pieces, was 450kg.
- [17] Andy Barbé gave evidence also pursuant to a conditional offer agreement signed with the Attorney General. He testified that he was introduced by the First Accused, Nedy Micoock, to the Second Accused, Vivian Domingue. He gave evidence that he would often collect consignments for them from the post office, Port Authority, and from the Airport Cargo. He would have to deliver the consignments either to the Second Accused's house at Belvedere, or at the First Accused's house at Belonie, or at the First Accused's shop at OJ Mall.

- [18] He gave evidence that between 8 and 18 March 2015, he travelled to Dubai where he stayed at the New Peninsula Hotel. During this trip he saw Vincent Florentine at the said hotel, and had also seen the First and Second Accused at the discotheque at this hotel. When he left on 18 March 2015, Mr. Florentine and both accused persons remained in Dubai.
- [19] On 20 March 2015, he received a call from a Dubai telephone number from the Second Accused, who asked him to collect a consignment for him from the Airport Cargo the following day. The Second Accused called him again on 21 March 2015 with the same request. He saw Theresette Barbé at the airport when he went to collect the cargo.
- [20] At around 10:00 am after he had collected three wooden boxes (which he identified in the photographs produced in Court), the Second Accused called him to inform him that he was being followed by the National Drug Enforcement Agency (NDEA). The Second Accused then revealed that the wooden boxes contained drugs. He was instructed to change the place of delivery to Souvenir, La Misere, where he removed the boxes from his pickup and hid them. While driving down the hill from La Misere he was intercepted by NDEA. Thereafter, he brought them to Souvenir but did not show them exactly where he had concealed the boxes as he was scared. Later at the NDEA Headquarters he was shown the contents of each box.
- [21] David Antat, an aviation security screener, screened three wooden boxes on 20 March 2015 at 1:30pm from Emirates flight EK 707 from Dubai, which were addressed to PUC. He identified the same boxes in photographs 15-17 of Exhibit P2. He gave evidence that he noticed an abnormality in the screening, specifically that he detected organic substances in one of the boxes, which was supposed to contain hardware. Screening of the other two boxes produced unclear results. He, therefore requested Agent Delcy (of the National Drugs Enforcement Agency - NDEA) to have all three boxes searched. He identified the three said boxes on the cargo manifest in Exhibit P20.
- [22] Joseph Sinon, Supervisor of Air Seychelles, corroborated David Antat's account by confirming that the cargo manifest in Exhibit 20 was the same one printed on 20 March 2015 before flight EK 707 from Dubai landed.

- [23] ASP Jemy Bouzin, Government Analyst, gave expert evidence that on 24 March 2015 he received four sealed evidence bags and a request for analysis. He confirmed that the exhibits brought to him for analysis by Agent Jacques Tirant were analysed and found to contain heroin with a total pure weight of 23,474.90 kilograms. His report (Exhibit P7) confirms his findings.
- [24] Durairaj Sasikumar, Procurement Director of PUC, gave evidence that the three wooden boxes in photographs 15-17 were never ordered by PUC, and that Exhibit P19 did not contain genuine PUC consignments.
- [25] Galmier Françoise, Officer of Immigration Division, produced the travel history for the First Accused (Exhibit P26), the Second Accused (Exhibit P27) and for Vincent Florentine (Exhibit P24).
- [26] Mario Didon, Sales Officer at Mason's Travel Agency, produced the tickets of the First and Second Accused (Exhibit P46) and the receipt issued to the Second Accused (Exhibit P47). He gave evidence that, according to the said ticket, the First and Second Accused persons were to travel to Dubai on 13th March 2015, to leave for China on 22 March 2015. Further, they were to return from China to Dubai on 31 March 2015 and then travel back from Dubai to Seychelles on 3 March 2015.
- [27] Agent Yvon Legaie was the arresting officer; on 12 February 2017 while he was on duty at the Seychelles International Airport, he arrested the First and Second Accused for the offences of importation of controlled drugs and conspiracy to import controlled drugs. Once both accused persons disembarked from Kenya Airways flight KQ250, from Nairobi, Kenya, they were escorted by Agents Legaie and Belle, in the company of five Kenyan officers, to Immigration, Health and Customs. The accused persons were then arrested, cautioned and read their Constitutional rights.
- [28] Agent Kathleen Belle corroborated the version of events as testified by Agent Yvon Legaie, stating that the two accused persons were arrested in her presence on 12 February 2017 at the Seychelles International Airport. Further, she gave evidence that she recalled seeing an international number starting with 971 on Theresette Barbé's Nokia phone; this number was registered under 'Steve 1'.

- [29] Inspector Ralph Agathine photographed three wooden boxes found in a ravine at Souvenir, La Misere, on 21 March 2015 at around 13.52 hours, which were covered by some green leaves. At around 15:52 hours at the NDEA headquarters, each wooden box was opened in his presence and he photographed eight black plastic packets from the first wooden box, four black plastic packets from the second, and four black plastic packets from the third wooden box.
- [30] Agent John Malvina received four sealed evidence bags from PSSW Officer Jacques Tirant on 12 May 2015 for safe keeping. He identified Exhibits P3, P4 and P5 (all exhibit bags containing black wrappings) and their respective contents (brownish substances later confirmed to be heroin) as the same he placed in the Exhibit store in relation to CB 165/2015.
- [31] Both accused persons gave sworn evidence and called five witnesses: Sadie Zialor, Desire Domingue, Tony Michel, Samuel Rath and Georges D'Offay.
- [32] The First Accused testified that he is a businessman. Vincent Florentine was a friend of his and had installed a music system in his car on two occasions. He denied having any dealings with him in the New Peninsula Hotel in Dubai, but accepted that he had the capability of facilitating the visa process for a Seychellois travelling to Dubai. He testified that upon reaching Dubai, the person would have to pay for his or her visa. He further gave evidence that Sadie Zialor, not Andy Barbé, was entrusted with the task of collecting his cargo. He stated that he knew the Second Accused because they both worked at the Indian Ocean Tuna (IOT) factory and testified that they were good friends. He stated that he travelled to Dubai in 2014 with the Second Accused to show him around Dubai, and also to carry out his own business. He denied ever having gone to Dubai for any dealings with the Second Accused. In 2015, he went for a business trip to Dubai and then went to China with the Second Accused, who knew China well, in order to purchase goods from a trade festival.
- [33] He gave evidence that he knew Theresette Barbé, who was a close friend to his girlfriend. He denied having introduced Ms Barbé to the Second Accused, and ever asking her to clear cargo for him. He further denied having had any dealings with Ms Barbé for the purpose of importing drugs into Seychelles. He further denied all allegations made

against him, including having contacted Andy Barbé or Vincent Florentine while he was in Dubai in March 2015, and that he imported or conspired to import controlled drugs into Seychelles with Vincent Florentine or Theresette Barbé. He denied ever having seen the three wooden boxes in photograph 15 of Exhibit P2, and denied the contents thereof belonged to him.

[34] In cross examination, reference was made to the case of *The Financial Intelligence Unit v Nedy Conrad Micoock & Shirley Gabriel* MC23 of 2014 (Exhibit D1 (3)) in which he had admitted in evidence that he knew his business associate, one Richard Battin, had been arrested in Kenya for a drug offence. He further accepted that in November 2013, a large sum of cash was seized from himself and his girlfriend, Shirley Gabriel, but that it was later released to him (because of an amendment to the law).

[35] It was put to him that the Supreme Court in its order of 18 January 2016 was satisfied (in Exhibit D1 (2)) that he could not account for the sum of money seized, given that he had been unemployed since 2011, nor could he account for the source of the money or for the discrepancies between the sums of money in his bank account and the goods he allegedly imported. He maintained that he was a businessman and that he could not recall having this money in his bank account. It was also put to him that the Court further satisfied itself that the cash and the two vehicles belonging to him were benefits of criminal conduct but he stated that he did not understand the question.

[36] He accepted having travelled on the same dates and flights as the Second Accused on multiple occasions, and that the two of them with Vincent Florentine travelled back together in March 2015. He further accepted that Vincent Florentine was hired to play music at the New Peninsula Hotel in Dubai but denied that he had made arrangements for Mr. Florentine's visa. He denied having ever sought Mr. Florentine's assistance to ship consignments for him in 2014 and 2015 from Dubai to Seychelles. He said he had used an agency for two years in Dubai to do that, but could not remember its name. He gave evidence that he only ever called Andy Barbé concerning a pool competition, and that it was his girlfriend who would call Theresette Barbé.

[37] Vivian Domingue also testified. He gave evidence that he had his own maintenance and construction business, with a number of staff under his employ. He further gave evidence

that he met the First Accused in 2005 while they were both working at IOT. He confirmed that he travelled to Dubai in 2015 to sort out a shipment for his wife and then travelled to China for a trade festival with the First Accused. Instead of returning to Seychelles after March 2015, he testified that he went to stay with his wife and child in Tanzania.

- [38] He gave evidence that, upon learning he was wanted by the NDEA, he researched what a blue notice meant and concluded that it did not mean he was a suspect. Therefore, he did not find it necessary to return to Seychelles. He further confirmed that he was with the First Accused in Kenya when they were arrested in February 2017.
- [39] Sadie Zialor gave evidence that he operates A&S Clearing Agency and that the First Accused was a regular customer of his. He testified that he had cleared approximately ten consignments for the First Accused from Land Marine and the airport cargo, and that they were addressed either to Nedy Micock, R&N Supplies or All Fashion Boutique. He testified that he did not clear cargoes from the post office for the First Accused. He confirmed that he would not be authorized to clear cargoes addressed to PUC and was not familiar with documents from Revenue Commission, Emirates and the invoice and receipt relating to a goods consignment (Exhibits P13-P17).
- [40] Mr. Tony Michel testified that he was employed by the Second Accused to bring his daughter to school between 2014 and 2015, and would also sometimes transport construction materials for him in a truck that belonged to the Second Accused. He confirmed that he never collected any consignment for the Second Accused from the airport cargo.
- [41] Desire Domingue gave evidence that he was the Second Accused's uncle and that he also worked with him in the construction business. In 2015, he notified the Second Accused that he was wanted by the NDEA.
- [42] Samuel Rath testified that he was a hired truck driver who used to transport construction materials for the Second Accused. He confirmed that he never collected any consignments from the airport cargo for him

[43] Georges D’Offay produced in evidence Exhibit 1, the telephone records for phone number 2512958, which the Second Accused stated was a prepaid number he was using until March 2015.

[44] Mr. Camille in closing has made several submissions on procedural defects. He stated that the charge sheet is bad in law and must be dismissed. He submits that since the accused persons were charged with the offences on 20 February 2017 under the repealed Misuse of Drugs Act, and the new Misuse of Drugs Acts 2016 has been in force since April 2017, they should have been charged under that Act and not the old Act.

[45] The Misuse of Drugs Act 2017 (the New Act) repealed and replaced The Misuse of Drugs Act 1995 (the Old Act) under which the accused persons have been charged. Section 55 of the New Act provides in relevant part:

The repeal under subsection (1) shall not

(a) affect the previous operation of the repealed Act or anything duly done or suffered under it

(b) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed Act

(c) affect any penalty, forfeiture or punishment incurred in respect of any offence under the repealed Act

(d) affect any investigation, legal proceedings or remedy in respect of any right.

and the investigation, legal proceedings or remedy may be instituted,

continued or enforced and any such penalty, forfeiture or punishment may be imposed as the Act. (Emphasis added).

[46] The provisions are more or less verbatim section 31 of the Interpretation and General Provisions Act which applies to any Acts “*enacted after [its] commencement ... except in so far as a contrary intention appears in the other Act.*”

- [47] Hence, the saving provision above preserves the legal effect of the repealed legislation and the rights and powers thereunder. The logic of prosecuting under the Old Act is that the New Act is not retrospective as regards factual situations arising during the application of the Old Act and which had been formed and concluded before the New Act came into force. In the present case, the investigation of the offence involving the two accused persons had started prior to the enactment of the New Act and during the currency of the Old Act. There were persons charged in connection to the same offence who have now turned state witnesses in the present case. I have no doubt of the propriety of a prosecution under the Old Act although prosecuted after its repeal given these circumstances.
- [48] The authorities referred to by Mr. Camille relate to offences “not known to law” framed under provisions of legislation that are repealed and not saved by succeeding legislation. They are clearly inapplicable to the present case where there is a specific saving provision. I am therefore unable to accept the submissions of Mr. Camille on this point.
- [49] Mr. Camille also submitted that Count 2 of the charge sheet relating to the offence of conspiracy with which the accused persons have been charged is bad in law. He submits that since the charge is made in reference to section 22 (a) of the Penal Code and not section 23 it is fatal to the case.
- [50] This line of reasoning is erroneous. There is a necessary distinction between charging an offence with reference to section 22 (a) as opposed to section 23 of the Penal Code. This has been explained in a number of authorities. It is incumbent on the Prosecution in view of the provisions of Article 19(2) (b) of the Constitution to give the details of the nature of the offence, to the person who is charged. This is an essential ingredient of the right to a fair hearing and the presumption of innocence enshrined in our Constitution.
- [51] The Penal Code of Seychelles makes a distinction between the concept of common intention in the case of principal offenders and joint offenders. It provides:

Principal offenders

Section 22. When an offence is committed, each of the following person is deemed to have taken part in committing the offence and be guilty of the offence, and may be charged with actually committing it, that is to say-

- (a) every person who actually does the act or makes the omission which constitutes the offence;
- (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
- (c) every person who aids or abets another person in committing the offence;
- (d) any person who counsels or procures any other person to commit the offence.

In the fourth case he may be charged with himself committing the offence or with counselling or procuring its commission.

A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

Any person who procures another to do or omit to do any act of such nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part, is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission, and he may be charged with himself doing the act or making the omission.

Joint offenders

23. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

[52] A further distinction in the two provisions is the fact that section 22 concerns crimes where there is an intention to commit a particular offence and it is that offence that is committed and section 23 concerns crimes committed different to the one intended at the outset

[53] In *Sopha v Republic* (2012) SLR 296, the Court held:

“Thus under section 23 a person can be made jointly and severally liable not only for the offence the parties set out to commit but also for any other offence that is committed in the prosecution of the offence they set out to commit...”

[54] In *Jean Francois Adrienne & Another v R* [2017] SCCA 25, Fernando JA was again at pains to explain the distinction between the two provisions. He stated:

“Section 23 applies in cases when an offence different to what the two or more persons originally formed a common intention to prosecute is committed. For instance when two or more persons form a common intention to commit robbery and in the prosecution of such robbery a murder is committed each of them is deemed to have committed murder if the commission of murder was a probable consequence of the prosecution of robbery.”

[55] To fall under section 22, some evidence of participation in the commission of the offence is necessary. As long as the prosecution can prove that the alleged offenders fell within the provisions of section 22, then each offender will be deemed responsible. For instance if one accused person did the act constituting the offence and the other helped him in some way or another that is sufficient.

[56] The authorities from Queensland based on sections 7 and 8 of their Criminal Code which are identical provisions to our sections 22 and 23 of our Penal Code (See *Warren and Ireland v The Queen* [1987] WAR 314 at 321; *R. v. Webb, ex parte Attorney-General* [1990] 2 Qd R 275, at 283 per Macrossan CJ; and per Thomas J at 287: *“In many circumstances, especially when acts are done in combination, it is unnecessary to show which accused person personally performed the acts”* (*Mohan v. The Queen* [1967] 2 A.C. 187; *Tripodi v. The Queen* (1961) 104 C.L.R. 1; *R. v. Wyles, ex parte Attorney-General* [1977] Qd.R. 169) support this approach.

[57] In the light of this clear legal distinction and in view of the fact that the alleged intended offence by the accused persons was the importation of drugs and not another alleged

offence committed in the commission thereof, I find that the charge is correctly framed even if it is unclear as to which accused person was the principal offender.

[58] Mr. Camille has also challenged the integrity of the chain of custody of the exhibited drugs (see Paragraph 6 of his written submissions). He submits that the exhibit offered as evidence must be exactly what it purports to and proof of who had the exhibit at all times between its seizure by the police officer and its production at trial must be demonstrated to the satisfaction of the court.

[59] It is his submission that since case file CR23/2015 in which the drugs were first produced was not itself produced and proved to court there is a clear doubt as regards the basis on which the drugs were kept with the Registrar of the Supreme Court. It is also his submission that the evidence of the court officers: the Registrar, Mrs. Emmanuella Bonne and Miss Stephanie Joubert are not reliable as they only amount to hearsay in the absence of the production of court file CR23/2015. He further submits that the Exhibit List (Exhibit 1) in CR23/2015 was not verified by the Registrar to confirm that each of the entries thereon relating to the purported records of procedure were not properly stated therein.

[60] Ms. Brigitte Confait for the prosecution adduced the following evidence: on 15th November 2016, the Registrar of the Supreme Court received from the court orderly, Stephanie Joubert, Exhibits P2 to P39, which were produced in case CR23/2015 before learned Judge Burhan. The Registrar gave further evidence that, in open Court, Accused Jacques Tirant sealed the exhibits (the drugs and their wrappings in a black box) and the Registrar signed the seals thereon. Thereafter, the box was brought for safekeeping into the safe in her office by Ms Joubert, in the presence of Accused Tirant, PSSW officers and Stephanie Joubert. On 18th November 2016, Emmanuella Bonne, in the presence of Agent Tirant and PSSW officers, collected the said box from the Registrar's office and brought it to Court. The seals were cut open by Agent Tirant in open Court and the box containing the Exhibits was resealed following the court session with new seals applied by Agent Tirant, which the Registrar signed. The box was also secured with two padlocks. Thereafter, it was returned to the Registrar's office.

- [61] This same procedure was carried out by the same parties in relation to CR 23/2015 on 28 November 2016, 29 November 2016, and 1 December 2016. Each time the box was removed from the Registrar's office, Sheryl Agrippine was present. A record was kept to reflect the movement of the box (Exhibit P44) and the same was signed at the Registrar's office by Emmanuella Bonne. Each time the box was presented in open Court, in the presence of Counsel and the presiding Judge, it was satisfied that the box had not been tampered with. On one occasion, two of the four seals were slightly damaged, one was damaged and the other remained intact, after the box was removed from the safe to allow for construction work to be carried out in the exhibit room.
- [62] The Registrar testified that the box could not be opened without the keys to the padlocks, which were left with Emmanuella Bonne at all times. In any event, while the box was removed from the safe for this purpose, the box remained under supervision at all times. The testimonies of Emmanuella Bonne, Stephanie Joubert and Agent Tirant corroborated the Registrar's evidence.
- [63] Agent Jacques Tirant, while on duty on 21 March 2015, received word that a white pickup truck which had collected three wooden boxes suspected to contain controlled drugs, had been stopped by the NDEA. He found the three wooden boxes in a ravine at Souvenir, obscured under freshly cut leaves, which he identified on photographs 1 to 8 of Exhibit P2.
- [64] The boxes were brought to the NDEA Headquarters, where they were photographed and documented. He found a hidden compartment underneath the hardware items in the boxes, revealing black packets, each of which contained brownish powdery substance. Each of the black packets were cut slightly open by NDEA Agent Seeward in his presence, and the contents were shown to Theresette Barbé and Andy Barbé, who had been arrested.
- [65] The evidence was sealed in evidence bags and labelled. On 24 March 2015, he handed them over to ASP Bouzin for analysis. The exhibit bags containing the substance were adduced as Exhibits P2A, P2B and P2C. That same day at 16:45 hours, Agent Tirant recovered the three sealed bags from ASP Bouzin, and handed them to Agent Seeward for safekeeping in the exhibit store at the NDEA Headquarters. On 12 May 2015, Accused

Tirant received four sealed evidence bags from Inspector Ralph Agathine in relation to CB 165/15, three of which contained the black packets containing the substance, and they were handed over to Agent Malvina for safekeeping. The wrappings were adduced as Exhibits P3 to P5. The witness was able to identify the bags and the contents thereof in the photographs and exhibits shown to him in Court as the same he had observed on 21 March 2015. He further corroborated the Registrar's account regarding the movement of the box of exhibits in his presence and the resealing thereof on 2 August 2017, 29 August 2017, 30 August 2017, and 31 August 2017, and on each subsequent hearing date.

[66] The analysis and scrutiny of evidence is necessary in ensuring that the accused persons are not charged with and convicted of importing substances different from the ones with which they are charged. However, in the present "he chain of custody" in the handling of the exhibits is clear and leaves no room for doubt. There is also no evidence whatsoever that the drugs were tampered with.

[67] On consideration of all the evidence adduced it is clear that the chain of custody of the evidence in regard to the exhibits from the time of detection to the time of analysis and production in court on each occasion has been established by the prosecution beyond reasonable doubt. The handling of the exhibits was cogent and thorough and the chain of custody assured by the careful handing over between the NDEA agents, court officers and the Registrar together with the application of the padlocks and seals and the precautionary signatures on the seals. I cannot therefore find favour with the accused persons' submission in this respect and reject it.

[68] In considering the charges against the two accused persons I turn first to the count relating to the importation of heroin, a controlled drug into Seychelles.

[69] Section 3 of the Misuse of Drugs Act 1995 (CAP 133) (hereinafter the Act) simply states:

"Subject to this Act, a person shall not import or export a controlled drug."

[70] There are necessarily components to the offence of importation of drugs: first, that there was an importation, secondly that the drugs were controlled by law, thirdly that the person committing the act of importation did so intentionally.

[71] With regard to the first element of the offence, the Act does not define the term ‘import’. It has been defined in section 22 of the Interpretation and General Provisions Act (CAP 103) as meaning “to bring, or cause to be brought, into Seychelles.”

[72] In *Clarisse v Republic* (1982) SLR 75 Sauzier J held that the expression “importation” meant to bring or cause to be brought into Seychelles and that where a parcel arrives by post from abroad, it constituted importation. Similarly in *Republic v Dubignon* [1998] SLR 52 Perrera J stated: –

“In Seychelles, in the absence of any definition, the word “import” must be taken in the broader sense of “to bring” or “cause to be brought” by air or sea.”

[73] It would suffice therefore that for a substance to be imported that it arrives in Seychelles and is delivered to a point where it will remain in Seychelles. In the present case it was established and not disputed that the substance arrived into Seychelles on board EK707 on 20 March 2015 and remained in Seychelles.

[74] In relation to the second element of the offence, it suffices to say that drugs are controlled if they are specified as being of Class A, B or C as set out in Schedule 1 of the Act. In the context of the present case, the drugs, heroin (diamorphine), is a Class A drug and is therefore controlled.

[75] There is a paucity of authority with regard to the third ingredient of the offence, namely the mental element in importation. In criminal offences generally, statute includes the mental element or the state of mind of the offender. When the definitions are silent as in this case, we rely on authorities to guide us.

[76] In *Assary v The Republic* [2012] SCCA 33, Msoffe J.A held that possession, or knowledge of possession, was a necessary component to be considered with regard to the offence of importation, stating –

“There is yet another dimension of the case which needs discussion here. This is in relation to the evidence of the witnesses that the appellant possessed the drugs by

virtue of the fact that she knew about their importation and actually possessed them.”

[77] While I do not think it necessary that one has to possess the substance being imported or demonstrate a direct preparatory act by the accused unless the charge is drafted so as to include this element as in *R v Dubignon* (supra), the offence of importation of controlled substances necessitates evidence of knowledge that the substances are controlled substances and are being imported.

[78] In *Republic v Liwasa* [2016] SCSC 94, Dodin J held that as at

“A general rule concerning all criminal cases is that a person has to have a ‘guilty mind’ if he is to be convicted...In order to determine whether the accused had knowledge or not ... the Court must look at the circumstances surrounding the action of the accused and his demeanour and conduct as observed and testified to in Court” (at paragraphs 18 and 23)

[79] The Prosecution sought to prove knowledge of the guilty mind of the accused persons primarily based on the sworn evidence of Vincent Florentine, a prosecution witness pursuant to a conditional offer agreement with the Attorney-General under section 61 (A) of the Criminal Procedure Code (Cap 54), which was primarily corroborated by the evidence of Theresette Barbé and Andy Barbé, two other prosecution witnesses pursuant to a similar agreement. Their evidence has to be therefore considered as that of an accomplice.

[80] It is an established rule of law that it is dangerous to convict on the evidence of an accomplice unless it is corroborated (Archbold Pleading, Evidence and Practice in Criminal Cases 42nd edition at page1143). However, it has since been established in *Dugasse v R* [2013] SLR 67 and *Lucas v R*, SCA 17/09 that in dealing with the evidence of an accomplice, there is no requirement for a corroboration warning.

[81] Florentine testified that in 2015, the Second Accused informed him there was a cargo to be shipped from Dubai for the First Accused and himself. The First Accused gave him cash for his ticket aboard Emirates Airline and the visa for Dubai. The Second Accused, Vivian Domingue, instructed and directed him for the collection of the cargo from an

apartment in Sharjah, from which three wooden boxes were handed to him from some African nationals. His testimony as detailed in paragraphs 7-8 above is evidence of the fact that he obtained and acted on instructions of the First and Second Accused for the shipment of the cargo to Seychelles.

[82] The evidence of Vincent Florentine was corroborated by the evidence of Theresette Barbé, who gave sworn evidence that she assisted the First Accused with the importation of the controlled drugs into Seychelles by making arrangements with Flash Clearing agency to clear the shipments. Her evidence that she remained in constant contact with the First Accused via mobile phone is corroborated by the evidence of Georges D'Offay from Cable & Wireless, who produced telephone records showing communication between Dubai number 00971525122161 with Seychelles number 2600797, registered to Shirley Gabriel, First Accused's girlfriend, between the period of 17 March 2015 and 21 March 2015.

[83] Theresette Barbé's evidence was further corroborated by that of Officer Daniel Delcy, who was approached by her to assist with the importation of drugs by ensuring that the consignment was released without being subjected to a search and Heather Longhurst, the owner of Flash Clearing Agency who testified that she assisted her in clearing the drugs on one occasion in March 2015 by instructing her employees, Shannon Barbé and Brigitte Jumeau, to prepare and handle the relevant paperwork.

[84] Shannon Barbé further corroborated this account by testifying that Heather Longhurst instructed her on 20 March 2015 to prepare the bill of entry for a consignment for PUC.

[85] Agent Jacques Tirant corroborated Andy Barbé's account of the collection of the drugs and its concealment in La Misère. I find therefore that there is ample corroboration of the three "accomplices" evidence in relation to the importation of the controlled drugs by the accused persons.

[86] There is also evidence of the requisite knowledge on the part of the accused persons from their own testimony in court. They both testified that they had travelled together on multiple occasions to Dubai and once on to China. They gave no proper explanation why they did not return as planned from China to Seychelles on 31 March 2015 and instead

went to East Africa. The First Accused's travel movements from Lungalunga in Kenya to Tanzania, on several occasions to Mia in Kenya, to Mombasa is not sufficiently explained by him. It points to the inference that he was evading arrest from the police since a blue alert had been issued by Interpol for both him and the Second Accused. They also did not explain what seemed to be too much of a coincidence, that is, of travelling together or in the company of Mr. Florentine to Dubai and back on several occasions or being in Dubai on at least three occasions at the same time as him.

- [87] Moreover there was no explanation of another coincidence, that is, that shipments were made from Dubai to Seychelles including the one of March 2015 intercepted by the NDEA at the time when the two accused persons were in Dubai. The First Accused could not satisfactorily explain the reason for the number of phone calls and texts from phones registered to his girlfriend Shirley Gabriel (2600797 and 2607581) and Dubai number 971525122161 to Andy Barbé's phone (2590767 and 2541949), Theresette Barbé's phone (2527847) and Vincent Florentine's phone (2580016).
- [88] The fact that the accused persons were together in Dubai at the material time, and the fact that neither of them returned to Seychelles when they learned the NDEA were looking for them, indicates their guilty mind.
- [89] In the circumstances, despite the fact that there is no direct evidence adduced in relation to the commission of the offence by the two accused persons and each of the different strands of evidence on their own may not sustain a conviction, taken together or as a whole, I am satisfied beyond reasonable doubt "that the inculpatory facts are incompatible with the innocence of both accused and incapable of explanation upon any other reasonable hypothesis other than that of the guilt of the accused" (See Thomas Starkie, A practical treatise of the law of evidence on Evidence, p. 839). I find that the prosecution has proved beyond reasonable doubt that the First and Second Accused did import the drugs as charged.
- [90] In regard to count 2, section 28 of the Misuse of Drugs Act of 1995 (now repealed) defined conspiracy as follow:

“A person who agrees with another person or persons that a course of conduct shall be pursued which, if pursued -

(a) will necessarily amount to or involve the commission of an offence under this Act by one or more of the parties to the agreement;

(b) would necessarily amount to or involve the commission of an offence under this Act by one or more of the parties to the agreement but for the existence of facts which renders the commission of the offence impossible,

is guilty of the offence and liable to the punishment provided for the offence”.

[91] Under the above stated law, the essential ingredient of the offence of conspiracy is an agreement between persons to do an unlawful act. In this case, the unlawful act would be the importation of heroin into Seychelles. The central issue in this case is whether or not the evidence established that there was an agreement between the two accused persons to import heroin into Seychelles.

[92] Halsbury’s Laws (5th Edn) paragraph 73 states that the offence of conspiracy is committed where two or more persons agree to pursue a course of conduct which, if carried out in accordance with their intentions, will necessarily amount to or involve the commission of an offence by one or more of the conspirators, or would do so but for the existence of facts which render the commission of the offence impossible.

[93] The conspiracy arises and the offence is committed as soon as the agreement is made; and the offence continues to be committed so long as the combination persists, that is until the conspiratorial agreement is terminated by completion of its performance or by abandonment or frustration or however it may be. The actus reus in a conspiracy is therefore the agreement for the execution of the unlawful conduct, not the execution of it. It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose (*Celestine v R* [2015] SCCA 33).

[94] Fernando JA at paragraphs 32-34 in *Dugasse & Ors v R* [2013] SLR (Vol. 1) 67 stated that there must be evidence to show that there was an agreement between two or more

persons to do an unlawful act. If it cannot be found that they have combined to commit an offence, there can be no conviction. It must be noted that no one conspiring to commit a crime draws a contract of the intended actions with a co-conspirator. Such agreement is inferred by the court on the evidence adduced. Archbold (2013) 33-14 states that:

Proof of the existence of a conspiracy is generally a matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.....Overt acts which are proved against some defendants may be looked at as against all of them.

[95] Beyond the agreement, intent must also be established. In *R v Anderson* [1986] AC at page 39 paragraph E, Lord Bridge stated the following –

“But beyond the mere fact of agreement, the necessary mens rea of the crime is, in my opinion, established if, and only if, it is shown that the accused, when he entered into the agreement, intended to play some part in the agreed course of conduct in furtherance of the criminal purpose which agreed course of conduct was intended to achieve. Nothing less will suffice; nothing more is required.”

[96] The central feature of a conspiracy is that the parties agree on a course of conduct that will necessarily amount to or involve the commission of an offence by one or more of the conspirators. Thus, a mere association of two or more persons will not constitute a criminal conspiracy. The main elements of conspiracy are a specific intent, an agreement with another person to engage a crime to be performed, and the commission of an overt act by one of the conspirators in furtherance of the conspiracy (*Celestine* (supra)).

[97] In *R v Taylor* [2002] Crim. L. R 205 at 37, the court held that what must be proved is that the accused knew the course of conduct agreed upon. The accused must agree to a course of conduct which involves an act or omission by at least one of them which is prohibited by the law.

[98] In effect, therefore, where a conspiracy count identifies in the particulars of offence a particular controlled drug, it must be proved against each defendant not merely that he knew that the agreement related to the importation, supply, etc. of a controlled drug, but also that either (i) to have known that it related to the particular drug mentioned in the

indictment, or (ii) to have known it related to the drug of the same class (*Celestine* (supra)).

[99] That knowledge can be inferred from the facts of this case. The evidence adduced by the prosecution goes beyond demonstrating a mere association of two persons. The planning inferred from the travel plans of the two accused persons, the coincidence of their presence in Dubai together, the money paid or promised and fares bought for the prosecution witnesses to or promised to the other participants, the emails and phone calls to the prosecution witnesses, the subterfuge and careful masterminding of the whole operation to import the drug into Seychelles, all point to the irresistible conclusion that they conspired to import the drugs into Seychelles as charged. I have already dealt with the issue of the danger of relying on corroboration provided by other co-accused persons in count 1 above which is equally applicable to the circumstances in the present count. There is in any case sufficient independent corroborating evidence as already set out above which is equally relevant and point to an irresistible inference of the guilt of the accused persons.

[100] In all the circumstances of the case and on consideration of the evidence of the prosecution I am satisfied that all the elements as contained in the charge in count two have been proved beyond reasonable doubt by the prosecution against the two accused persons.

[101] I therefore find both accused persons guilty of the charges and proceed to convict them of the two counts as charged.

Signed, dated and delivered at Ile du Port on 5 March 2018.

M. TWOMEY
CHIEF JUSTICE